

Panel to Hear Arguments On Monday

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NEW YORK, June 19—A federal district court judge held today that publication of the Pentagon's Vietnam war history would cause only "some embarrassment" and no danger to the government, but an appellate judge blocked The New York Times from printing it at least until Monday.

District Judge Murray I. Gurfein, finding that the government's secret evidence proved no more than a case of "the jitters" among security agents and some foreign governments, refused to grant an injunction and said his unprecedented four-day restraining order against The Times should end.

Within an hour, however, Judge Irving R. Kaufman of the second U.S. Circuit Court of Appeals, the only appellate judge in the federal court-house, extended the restraining order until noon Monday to enable a panel of three judges to assemble and hear the case.

The Times decided against further appeal to a Supreme Court justice and chose instead to seek a prompt affirmation of Judge Gurfein's decision in the court of appeals on Monday.

Judge Gurfein laced his 16-page opinion with references to the need for a free press as a "safety valve" in "troubled times," but he dealt his severest blow to the Justice Department's injunction suit by dismissing pleas of an imminent military and diplomatic "disaster."

Despite a four-hour closed session Friday that gave the government "an opportunity to pinpoint what it believed to be vital breaches to our national security," he said, "no cogent reasons were advanced as to why these documents except in the general framework of embarrassment—vitally affect the security of the na-

tion." Judge Gurfein said he had the power to block publishing of the most seriously detrimental information in wartime or other emergency—a point conceded by The Times in theory—but that the government simply failed to produce enough evidence to raise "the delicate question" of when to use that power.

He said the government's claim had an especially heavy burden in light of "the compelling force" of First Amendment press freedoms.

The judge wrote: "If there be some embarrassment to the government in security aspects as remote as the general embarrassment that flows from any security breach, we must learn to live with it. The security of the nation is not at the ramparts alone. Security also lies in the value of our free institutions."

"A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know."

The judge concluded, "These are troubled times. There is no greater safety valve for discontent and cynicism about the affairs of government than freedom of expression in any form. This has been the genius of our institutions throughout our history. It has been the credo of all our presidents."

Judge Gurfein emphasized that in his view "there has been no attempt by the government at political suppression. There has been no attempt to stifle criticism."

The government, he said, sought the injunction "in absolute good faith to protect its security and not as a means of suppressing dissident or contrary political opinion. It has been publicly stated that the present administration had adopted a new policy with respect to Vietnam."

But the administration's new Vietnam policy, said the judge, only emphasizes that "prior policy" as reflected in the military archives "must be considered as history rather than as an assertion of present policy" which could be damaged by exposure.

Just as the administration had acted in good faith, he said, so had the Times in publishing three parts of a series and pressing its right to print

more. Noting that the government conceded "the good faith" of The Times, Judge Gurfein cast doubt on whether the government could ever succeed in a subsequent criminal prosecution of the newspaper.

The federal criminal law which the government said was the prime source of its right to an injunction specifies that an accused must "willfully" communicate classified information which he unlawfully possesses.

Dissecting the law, which is part of the espionage section of the criminal code, the judge said Congress's failure to specify bans on "publication" was another reason for refusing to invoke the law against The Times.

He found no reasonable likelihood that the government could ever prove bad faith or other key elements under the law in the suit filed Tuesday.

"This has been an effort on the part of The Times to vindicate the right of the public to know. It is not a case involving an intent to communicate vital secrets for the benefits of a foreign government or to the detriment of the United States," he said.

Judge Gurfein noted that research by both sides and his own investigation had not turned up "a case remotely re-

sembling this one" in American judicial history "where a claim is made that national security permits a prior restraint on the publication of a newspaper."

Although he denied the government's request to extend the injunction beyond today's 1 p.m. deadline, he gave the government time to seek a stay from the court of appeals.

U.S. Attorney Whitney North Seymour Jr. promptly went to Judge Kaufman, who held his own brief hearing.

Seymour said higher courts should have an opportunity to pass on the momentous questions involved. He said The Times "would not be prejudiced" competitively if forced to wait until Monday to resume the series, since The Washington Post is under a similar temporary stay.

Judge Kaufman, citing his own lectures on the value of a free press, said he was issuing the stay without intimating any view on the issues in the case. He said he was moved by "institutional considerations" because his court sits in panels of three judges. He said his colleagues might have "a sound basis for saying I had usurped power" by deciding this important matter alone.